



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 17, 2015

Anne Russell
Interim Assistant City Attorney
990 Palm Street
San Luis Obispo, CA 93401-3249

Re: Your Request for Advice
Our File No. A-15-139

Dear Ms. Russell:

This letter responds to your request for advice regarding conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

Please note this letter is based only on the facts presented. The Fair Political Practices Commission (the “Commission”) does not act as a finder of fact when it renders advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Is the proposed volunteer hearing administrator a public official, subject to the Act’s disclosure and disqualification provisions?
2. Is the volunteer hearing administrator making or participating in making a governmental decision when he or she rules on municipal code violation appeals, even though those decisions can be further appealed?

CONCLUSIONS

1. Yes. The proposed volunteer hearing administrator is a public official even if he or she is not compensated for the position.
2. Yes. The volunteer hearing administrator is making a governmental decision when he or she upholds or revokes an administrative citation.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

You are the interim assistant city attorney for the City of San Luis Obispo, seeking formal advice as to whether a proposed volunteer hearing administrator would be considered a public official, subject to the Act's disclosure and disqualification provisions.

The City is in the process of amending its municipal code regarding appeal procedures for administrative fines or penalties assessed for municipal code violations. Administrative fines are separate from other enforcement remedies and possible code violations vary.

The proposed procedures would create two levels of appeals for the administrative citations issued. After an administrative citation is issued by a police or code enforcement officer, the first level of appeal would be heard by a volunteer hearing administrator selected by the City Manager. The hearing administrator would conduct an informal hearing and then issue a written decision either upholding or revoking the City's administrative citation. If upheld, the decision would require the code violator to pay an administrative fine. The City would require the hearing administrator to disqualify himself or herself from hearing any matter in which he or she had a personal or financial interest or bias.

Decisions are final unless timely appealed to either the Superior Court or to the City appeals board having jurisdiction. While there is a second level of review, your questions concern the volunteer hearing administrator who is responsible for the first level of appeal. The City anticipates some difficulty in obtaining volunteers if they had the added responsibility of filing a Statement of Economic Interests ("Form 700").

ANALYSIS

The Act's conflict-of-interest rules prohibit a public official from making, participating in making, or using his or her official position in any way to influence a governmental decision in which the official knows, or has reason to know, that he or she has a "financial interest." (Section 87100.)

Accordingly, certain state and local public officials must file periodic Statements of Economic Interests (Form 700) disclosing those personal assets and interests that may be affected during the performance of their official duties. (Sections 87200 - 87350.) Public officials who are required to file statements of economic interests are either identified in Section 87200 (statutory filers) or designated in an agency's conflict-of-interest code (designated employees or code filers). (Sections 87300 and 87302.)

"Public officials" and "designated employees" include "every member, officer, employee or consultant of a state or local government agency." (Sections 82019 and 82048.)

The test is whether the volunteer hearing administrator's decisions in appeals hearings are considered "making or participating in making a governmental decision" even though the decisions may not necessarily be final.

An official is making a decision if the official “authorizes or directs any action, votes, appoints a person, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his agency.” (Regulation 18704(a).) Participating in a decision occurs when the official “provides information, an opinion, or a recommendation for the purpose of affecting the decision without significant intervening substantive review.” (Regulation 18704(b).)

“Significant intervening substantive review” has been interpreted to require more than the mere review of the recommendations by superiors, but rather the independent checking of the results without solely relying on the data of the official. (*Greenwold* Advice Letter, No. I-90-349.) Furthermore, in the past, we have found that an official participates in a decision, even if it is reviewed by several of his or her superiors, if: (1) those superiors rely on the data or analysis prepared by the official without checking it independently; (2) if they rely on the professional judgment of the official; or (3) if the official in some other way actually may influence the final decision.

Your facts indicate the volunteer hearing administrator will be making and participating in the decision. When the decision is not appealed, the volunteer hearing administrator’s decision is final. It commits the City to upholding the administrative citation and enforcing the fine. Even if the decision is appealed, the hearing administrator has made the initial investigation and issued an opinion which required the exercise of independent judgment and discretion. While an appeal would result in a review of the decision, the City appeals boards would rely on information provided by the hearing administrator. Therefore, the hearing administrator’s decision will not be subject to significant intervening substantive review.

Accordingly, we find the proposed volunteer hearing administrator is a public official who will be making and participating in making governmental decisions, and therefore he or she is subject to the Act’s disclosure and disqualification provisions.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Hyla P. Wagner
General Counsel

/s/

By: Kelly Liang
Intern, Legal Division

KL:jgl